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No. 94-870

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RAFAEL GARCIA,

Petitioner,

v.

CITY OF CHICAGO, JACK O'MALLEY, State's Attorney of Cook County, MICHAEL F. SHEAHAN, Sheriff of Cook County, and C. RICHARD ENGLISH,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS JACK O'MALLEY, MICHAEL F. SHEAHAN AND C. RICHARD ENGLISH IN OPPOSITION

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QUESTIONS PRESENTED*

1. Whether the Fourth Amendment requires the presence of a hospitalized arrestee at his probable cause hearing.

2. Whether Garcia, who was not incarcerated at the time he filed suit, had standing to seek injunctive relief and whether the State's Attorney is a state official entitled to Eleventh Amendment immunity.

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* We address only the questions presented with respect to State's Attorney Jack O'Malley, Sheriff Michael F. Sheahan, and C. Richard English. The City of Chicago has addressed the remaining questions in its brief in opposition.

Constitutional Provisions:

U.S. Const. Amend. IV ..... *passim*
U.S. Const. Amend. XIV 5, 7

Statutes:

42 U.S.C. § 1983 2

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OPINIONS BELOW

The opinion of the United States of Appeals for the Seventh Circuit (Pet. App. 1-18) is reported at 24 F.3d 966. The opinions of the United States District Court for the Northern District of Illinois (Pet. App. 20-41) are unreported.

STATEMENT

On March 15, 1991, Chicago Police Officer Anna Gall arrested petitioner Rafael Garcia ("Garcia"), who at the time was on probation for two felonies and had an out-

standing bond forfeiture warrant, for possession of a controlled substance, after observing a bag containing white powder at his feet. (Pet. App. 1) Garcia was injured in the arrest and taken to a nearby hospital. *Id.* at 1-2. The next day, while Garcia remained hospitalized and in custody, counsel (a public defender) was appointed for him and a judge found probable cause to charge him with possession of a controlled substance. *Id.* at 2. The public defender asked for a reasonable bond on Garcia's behalf. *Id.* The court set bond for violating probation and possessing a controlled substance. *Id.*

On March 18, while Garcia remained hospitalized, the court set a preliminary hearing for April 10, 1991. (Pet. App. 2) On March 20, Garcia was released from the hospital and having failed to post bond, was transferred to Cook County Jail. *Id.* On March 26, the Chicago Police Department laboratory tested the powder and found it to be negative for any controlled substance. *Id.* At the preliminary hearing on April 10, the court granted the prosecutor's motion to dismiss the case based upon the laboratory finding. *Id.*

Garcia then filed an action under 42 U.S.C §1983 seeking money damages against the City of Chicago; Officer Anna Gall; Cook County State's Attorney Jack O'Malley; Cook County Sheriff Michael Sheahan; the Cook County Department of Corrections; and then-acting Executive Director of Cook County Jail C. Richard English. (Pet. App. 2-3, 20)[1]

Garcia claimed that (1) his probable cause (*Gerstein*) hearing was inadequate because he was not brought be-

[1] We address only the claims against Cook County State's Attorney Jack O'Malley, Sheriff Michael Sheahan, and Mr. English.

fore the judge; (2) Officer Gall used excessive force to arrest him; (3) State's Attorney O'Malley, Sheriff Sheahan and Director English were responsible for detaining him without probable cause, and (4) the City of Chicago's procedures for testing substances were constitutionally inadequate. (Pet. App. 3) Defendants State's Attorney O'Malley, the Cook County Department of Corrections, and the City of Chicago and Officer Gall all filed motions to dismiss. (Pet. App. 20)

The district court dismissed the claims against State's Attorney O'Malley based on eleventh amendment immunity from civil liability (Pet. App. 22-23) and the claims concerning the adequacy of Garcia's probable cause hearing, ruling that the constitution did not require Garcia's physical presence during the proceeding. *Id.* at 24-26 Garcia sought reconsideration of the ruling and also sought leave to file a second amended complaint that in essence repeated the *Gerstein* claims. (Pet. App. 3) Sheriff Sheahan and Director English filed a motion for summary judgement. (Pet. App. 3) The district court denied both of Garcia's motions, and dismissed Sheahan and English. (Pet. App. 3, 32)

Garcia then filed a third amended complaint against only the City of Chicago and Officer Gall. (Pet. App. 3, 32) The City defendant's motion to dismiss was granted in part, the district court rejecting Garcia's claims based upon the constitutional adequacy of the laboratory tests performed upon the white powder found at his feet. (Pet. App. 35-39) The court did not dismiss Garcia's claims of excessive force and of false arrest against Office Gall and these were subsequently settled. (Pet. App. 3, 39)

Garcia then appealed, contesting the district court's dismissal of the claims against the State's Attorney, the

Cook County Sheriff and the Director of the Cook County Department of Corrections, as well as his claims based on the controlled substances testing procedures employed by the City of Chicago. The court of appeals held that the claims against the State's Attorney were barred by the eleventh amendment since under Illinois law, State's Attorneys are state, not county officials. (Pet. App. 4) The court of appeals also ruled that the constitution did not grant Garcia a right to be personally present at his probable cause hearing held the day after his arrest, and noted that Garcia never contended that he was physically capable of leaving the hospital. (Pet. App. 4-5) The court further found no constitutional deficiencies in the laboratory testing procedures employed by the City of Chicago Police Department in this case. (Pet. App. 6-9)

ARGUMENT

I.

THE FOURTH AMENDMENT DOES NOT REQUIRE THE PRESENCE OF A HOSPITALIZED ARRESTEE AT HIS PROBABLE CAUSE HEARING.

Garcia, who concedes that there was probable cause for his arrest, and who does not even now contend that he was medically capable of attending his probable cause hearing, which was held within 48 hours of his arrest, nevertheless asks this Court to expand upon its holding in *Gerstein v. Pugh*, 420 U.S. 103 (1975), and rule that the fourth amendment requires the physical presence of the person arrested without a warrant at the probable cause hearing, absent "exceptional circumstances." (Pet. 25, 27) Garcia further asserts that there existed a conscious or deliberate policy by unnamed "governmental of-

ficers" to ignore the clear mandates of an Illinois state statute requiring the presence of an arrestee at the probable cause hearing and that this "abuse of power" resulted in both fourteenth and fourth amendment violations. (Pet. 26-27)

While respondents maintain that the court of appeals correctly held that the fourth amendment did not require Garcia's presence at his probable cause hearing (Pet. App. 5), respondents agree with respondent City that Garcia failed to demonstrate his standing to raise this issue. (Brief in Opp. 5, fn. 3) As noted by the City, even if Garcia were correct that an arrestee is constitutionally entitled to personally attend a probable cause hearing, he has not explained how this requirement would be applied to a hospitalized arrestee like himself. Of course, if there were no violation of his rights because he was hospitalized, he has no "personal stake in the outcome." Therefore, he lacks standing to raise this issue. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

This court has held that the fourth amendment requires a judicial determination of probable cause either before or promptly after arrest as a prerequisite to extended pretrial detention. *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975); *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661 (1991). It has never held that the fourth amendment requires the presence of the arrestee at the determination of probable cause. In *Gerstein*, the court ruled that adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. 420 U.S. at 120 The standard for making this determination is the same as that for arrest. *Id.* Further, the court approved the use of informal procedures for making the probable cause determination. 420 U.S. at 121.

Several circuits in addition to the Seventh Circuit in the instant case have specifically held that the Fourth Amendment does not require the presence of an arrestee at his probable cause hearing. *See, McLaughlin v. County of Riverside*, 888 F.2d 1276, 1279 (9th Cir. 1989), *vacated on other grounds* 111 S.Ct. 1661; *King v. Jones*, 824 F.2d 324, 327 (4th Cir. 1987). The Ninth Circuit Court of Appeals reasoned, relying upon *Gerstein*, that the fourth amendment affords those arrested without a warrant the same right to have the evidence reviewed by a neutral and detached magistrate as that enjoyed by those arrested with a warrant. 888 F.2d at 1279. The court observed that those arrested with a warrant have not attended a probable cause determination and stated "[w]e perceive no basis for holding that the fourth amendment grants warrantless arrestees such a right." *Id.* Although Garcia has pointed to no decision which finds the existence of such a right, he suggests that this Court's recent decisions in *County of Riverside v. McLaughlin*, 111 S.Ct. 1661 (1991), and *Albright v. Oliver*, 114 S.Ct. 807 (1994), support interpreting the fourth amendment to require that the arrestee be physically present for a probable cause determination made after a warrantless arrest.

Neither this Court's opinion in *McLaughlin* or *Oliver* supports such a novel and expansive reading of the Fourth Amendment. Indeed, both opinions are completely irrelevant to this issue. In *McLaughlin*, the sole issue addressed by this Court was what constitutes "prompt" under *Gerstein*, 111 S.Ct. at 1665. The Court ruled that judicial determinations of probable cause within 48 hours will, as a general matter, comply with the promptness requirement of *Gerstein*, and that after 48 hours, the burden shifts to the government to demonstrate the existence of a bonafide emergency or other circumstance. 111 S.Ct. at

1670. It is undisputed that Garcia received a judicial determination of probable cause within the 48 hour time period specified in *McLaughlin*.

In *Albright*, the petitioner, who surrendered himself to authorities after the issuance of an arrest warrant, asked this Court to recognize a substantive right under the due process clause of the fourteenth amendment to be free from criminal prosecution except upon probable cause. 114 S.Ct. at 810. The petitioner did not claim any violation of his fourth amendment rights. 114 S.Ct. at 810. While the plurality concluded that substantive due process did not apply to petitioner's claims, which should be judged under the fourth amendment, that holding does nothing to advance Garcia's view that the fourth amendment guarantees the right of an arrestee to be present at a post-arrest determination of probable cause. Further, Garcia, unlike *Albright*, does not contest that there was probable cause for his arrest. (Pet. App. 6, 24)

Rather than supporting his claim, the *Albright* decision appears to undercut Garcia's argument that his fourteenth amendment due process rights as well as his fourth amendment rights were violated because his "nonappearance" was allegedly pursuant to the "conscious or deliberate adherence by governmental officers to a policy which ignores the clear mandates of a state statute." (Pet. 26-27, 30) The court in *Albright* indicated that probable cause for arrest determinations were properly analyzed under the fourth amendment rather that under the fourteenth amendment due process clause. Thus, insofar as Garcia is contending that the alleged policy constitutes a due process violation, under the rationale of *Albright*, that constitutional provision is not applicable to probable cause determinations.

Moreover, the Seventh Circuit properly did not consider this argument since Garcia did not allege sufficient facts to show the existence of a policy that caused a constitutional violation and since he failed to attribute the supposed policy to any specific policymaker. *See, Monell v. Dept. of Social Services of City of New York*, 436 U.S. 655 (1977). Garcia merely alleged the facts in his own case, which single incident is insufficient to establish a custom or policy. *See, City of Oklahoma v. Tuttle*, 471 U.S. 808, 823-24 (1985). Further, as noted by the Seventh Circuit, Garcia never contended that he was physically capable of leaving the hospital, and he received a timely and constitutionally sufficient probable cause hearing in which he was represented by an attorney. (Pet. App. 5)

Garcia has presented no authority to this Court which supports his novel view that the fourth amendment requires the presence of an arrestee at his *Gerstein* hearing. The *Gerstein* decision itself, as well as the lower courts which have directly considered this issue, indicate that the fourth amendment imposes no such requirement. Further, Garcia does not contend that his arrest was not supported by probable cause, nor does he even contend that he was physically able to attend the hearing. Thus, there is simply no reason for this Court to consider this question.

II.

GARCIA, WHO WAS NOT INCARCERATED AT THE TIME HE FIRST FILED SUIT, LACKED STANDING TO SEEK INJUNCTIVE RELIEF, AND THE STATE'S ATTORNEY IS A STATE OFFICIAL ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

Should this Court reverse the holding below on the *Gerstein* issue, Garcia asserts that he is entitled to injunctive and declaratory relief despite the fact that he

was not incarcerated at the time he initially filed suit. Garcia further asserts that the State's Attorney should not have been dismissed from a claim for money damages on the basis of the eleventh amendment until a finding of fact was made by a federal district court concerning his status as a state or county official. (Pet. 38-56)

Neither of these claims have merit. With respect to Garcia's claim that he is entitled to injunctive and declaratory relief, he relies upon three decisions of this court. *Gerstein v. Pugh*, 420 U.S. 103 (1975) (Pet. 41-42); *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661 (1991) (Pet. 42); and *United States Parole Comm. v. Geraghty*, 445 U.S. 388 (1980) (Pet. 42-43). In all of these decisions however, the plaintiffs filed suit while still incarcerated, unlike Garcia in the instant case. Since Garcia was not incarcerated he was not subject to any current constitutional deprivation at the time he filed suit and thus he lacked standing to bring a claim for injunctive relief.

The instant case is governed by the rule for injunctive relief as set forth in *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983): "[t]he plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the threat of injury must be both real and immediate." The plaintiff in *Lyons* was injured when he was arrested by police officers who administered a chokehold on him. The plaintiff sought an injunction prohibiting members of the Los Angeles Police Department from administering chokeholds in the future. This Court held that plaintiff lacked standing to seek the injunction because he had failed to show that he was in danger of being arrested and subjected to a chokehold in the near future. Similarly, Garcia never alleged any facts to show it is like-

ly that he would be arrested and detained without being brought before a judge and therefore he too lacks standing to seek injunctive relief. Though the court of appeals cited *Lyons* to support its ruling that Garcia lacked standing to sue for injunctive relief, Garcia makes no attempt to distinguish the case in his petition to this court. (Pet. App. 4)

With regard to Garcia's claim that further fact finding is required before it may be properly ruled that the State's Attorney is a state rather than a county official and thus entitled to eleventh amendment immunity from money damages, respondents maintain that the issue is one of Illinois law which has already been resolved by the Illinois Supreme Court in *Ingemunson v. Hedges*, 549 N.E.2d 1269, 1272 (Ill. 1990). This ruling was properly relied upon by the court of appeals in this case in ruling that the State's Attorney was a state official entitled to eleventh amendment immunity. (Pet. App. 4)

Recently, the Seventh Circuit considered the issue of the status of the State's Attorney as a state or local official in a labor context, and again relying upon *Ingemunson v. Hedges, supra*, concluded that he is a state official. *McGrath v. Gillis*, ____ F.3d ____ (No. 94-2443, decided January 6, 1995) The *McGrath* court definitively stated, "Illinois case laws holds . . . that State's Attorneys are employees of the State of Illinois." *Id.* In *Ingemunson v. Hedges*, the Illinois Supreme Court reviewed the language of the Illinois constitution, which places the office of the state's attorney in the Judicial Article, Ill. Const. 1970, Art. VI, Sec. 19, and numerous prior decisions, and ruled that State's Attorneys should be classified as state, not county officials. 549 N.E.2d at 1272.

Further, since the State's Attorney prosecutes cases pursuant to state statute, he is a state official for the pur-

pose of constitutional liability. *See, Scott v. O'Grady*, 975 F.2d 366 (7th Cir. 1992).

Despite the Illinois constitution and the recent decisions of the Illinois Supreme Court and court of appeals directly resolving the issue of whether the State's Attorney is a state official, Garcia claims that a decision of this court, *Edelman v. Jordan*, 415 U.S. 651 (1974), requires that a federal district court conduct fact finding to determine "the source of funds for payment of any judgement against" the state's attorney in his official capacity. (Pet. 47) *Edelman*, however, imposes no such requirement.

In *Edelman*, the court ruled that since the retroactive portion of the relief awarded by the district court must inevitably come from the general revenues of the state, the award was akin to a monetary award against the state itself and was barred by the eleventh amendment although the state itself was not a party to the suit and although it was argued that the relief did not constitute money damages but rather "equitable restitution." 415 U.S. at 664-666. This decision does not support the necessity of wide ranging fact-finding concerning the source of payment for damages, sought by Garcia in the present case.

Under *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), the definition of "person" suable under Section 1983 does not extend either to the state itself or to official-capacity lawsuits against state officials. The court of appeals and the Illinois Supreme Court have conclusively held that the State's Attorney is a state official. Thus, Garcia has failed to allege an element of his section 1983 suit against State's Attorney O'Malley, that a "person" violated his constitutional rights. The question raised by Garcia as to which entity would pay a hypothetical

money judgement against the State's Attorney is not supported by any precedent and is entirely speculative and irrelevant. There is no merit to any of Garcia's claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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